Supreme Court, U.S.
FILED
JAN 30 1996
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

JOSEPH B. HYMAN,

Petitioner

v.

VIRGINIA DEPARTMENT OF TAXATION

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the Supreme Court of Virginia's refusal to hear fee claims from counsel for the Virginia pensioners who recovered in this Court deprive them of property without due process and deny them equal protection inasmuch as the common fund doctrine has been recognized as the law of Virginia for one hundred years and has been recognized by federal law for a like period?

2. Does the action of the Supreme Court of Virginia in refusing to even consider the fee claims of petitioners violate the first Amendment right to free speech and to petition for redress of grievances?

PARTIES TO THE PROCEEDING

The following are twenty-five persons receiving federal retirement benefits, civil or military or both, who paid to the Commonwealth the income taxes levied by it on those benefits:

Lawrence E. Lewy and Miriam Lewy
Ralph J. Broberg and Rose Broberg
Gerald M. Boatwright and Carol Boatwright
Robert V. Brown and Nancy L. Brown
Donald L. Burt and Lydia Burt
Claude B. Cross and Alta Rae Cross
Charles L. Gibb and Isabelle C. Gibb
Franklin P. Michels and Elizabeth M. Michels
Joseph E. Mazur and Barbara I. Mazur
Paul N. Pfeiffer and Jean Z. Pfeiffer
Merritt Ruhlen and Florence E. Ruhlen
Robert R. Valdez and Doris Mae Valdez
Walter G. Walker, Jr.

Joseph B. Hyman, Echols & Hyman and Lawrence Lewy as counsel for the above persons claim attorneys' fees and this Petition is brought on their behalf.

The Virginia Department of Taxation was the Defendant below.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

No. _____

JOSEPH B. HYMAN,

Petitioner

v.

VIRGINIA DEPARTMENT OF TAXATION

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

PETITION FOR A WRIT OF CERTIORARI

Joseph B. Hyman, on behalf of himself and his associates, as counsel in *Lewy v. Department of Taxation* in the Virginia taxation refund cases, petitions this Court for a Writ of Certiorari to the Supreme Court of Virginia.

OPINIONS BELOW

The rulings of the Supreme Court of Virginia dated November 2, 1995, as yet unreported according to information and belief. The prior decision of the Supreme Court of Virginia dated September 15, 1995, reported at 250 Va. 184 and at 462 S.E. 2d 892.

JURISDICTION

The Supreme Court of Virginia issued its opinion on remand from this Court, entering final judgment in favor of federal pensioners in the *Lewy* and *Harper* cases. The Court summarily refused to consider petitioners' claim for counsel fees on November 2, 1995. This Petition is accordingly filed in the time allowed by law. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment XIV provides, in pertinent part as follows:

> . . . or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Amendment I provides in pertinent part as follows:

> Congress shall make no law . . . abridging the freedom of speech . . . or of the right of the people peaceably to assemble and to petition the government for redress of grievances.

STATEMENT

Petitioners were counsel in the Virginia litigation over the right of federal pensioners to a refund of the taxes paid by them on their federal pensions when the State exempted from taxes the pensions to its own retired employees. That litigation lasted for well over six years. It involved two hearings before the trial court, the Circuit Court of the City of Alexandria, three hearings before the Supreme Court of Virginia, and two grants of Petitions for

Certiorari by this Court and this Court's rulings in *Harper v. Virginia Department of Taxation,* 509 U.S. ___, 113 S.Ct. 2520, and *Lewy v. Virginia Department of Taxation,* 509 U.S. ___, 113 S.Ct. 3024.

After granting the first Petitions this Court vacated the judgment of the Supreme Court of Virginia and remanded the cases for consideration in light of this Court's decision in *James B. Beam Distilling Co. v. Georgia,* 501 U.S. 529, 111 S.Ct. 2338 (1991); *Harper v. Virginia Department of Taxation* and *Lewy v. Virginia Department of Taxation,* 501 U.S. 1247 (1991). The Supreme Court of Virginia reaffirmed its judgment on that remand. 242 Va. 322, 410 S.E. 2d 629 (1991).

On the second Petitions, this Court heard argument in *Harper,* holding the *Lewy* Petition in abeyance and after deciding *Harper,* vacated the judgment of the Supreme Court of Virginia and granted the Lewy Petition, vacating the judgment in *Lewy* as well. Both cases were remanded to the Supreme Court of Virginia which remanded them in turn to the Alexandria Court. *Harper v. Virginia Department of Taxation,* 509 U.S. ___, 113 S.Ct. 2520, *Lewy v. Virginia Department of Taxation,* 509 U.S. ___, 113 S.Ct. 3024 (1993).

On this second remand, the Alexandria Court ruled that Virginia had in its Declaratory Judgment Act a meaningful pre-deprivation remedy satisfying the requirements of federal due process. It also ruled that it had discretion under code of Virginia, 58.1-1826 to deny relief even if the taxes were illegally levied in violation of the Fourteenth Amendment, and it exercised this discretion for reasons of equity, unstated, in favor of the State.

The Supreme Court of Virginia granted the Petitions of the plaintiffs for appeal from the trial court's judgment. While the appeals were pending the General Assembly of Virginia, apparently on the advice of the Attorney General, offered to settle the claims of the pensioners for 30 cents on the dollar, and later for 45 cents on the dollar, including interest. Chapter 5, 1994 Virginia Acts, Special Session I. The Supreme Court of Virginia then, at the request of the Attorney General, stayed the appeals for six months over the objections of Lewy counsel so that the State could carry through its settlement procedure.

Lewy counsel was present at the argument before this Court in *Reich v. Collins,* 513 U.S. , 115 S.Ct. 547 (1994). The solicitation for acceptances of the Virginia settlement was to be sent out on December 15, 1994. Counsel accordingly asked the Supreme Court of Virginia to order the Department of Taxation to delay its solicitation until the decision in *Reich,* on the ground that this Court was likely to vacate the Georgia judgment but might not act before December 15. This motion was denied on the ground that the Court had no injunctive power. When the *Reich* decision came down on December 4, Lewy counsel again filed a motion in the Supreme Court of Virginia asking it to instruct the Department of Taxation to disclose to the pensioners that *Reich* had been decided and, in particular, its bearing on the pensioners' claims. That motion was also denied, *sub silentio.* All the Department of Taxation disclosed in its solicitation was that this Court had decided *Reich* and suggested that if the pensioners wanted to know more about *Reich* they should consult their own attorneys. Only about

14,000 of the 170,000 pensioners rejected the settlement.

After the solicitation was made, the Supreme Court of Virginia heard the appeals from the Alexandria Court on June 7, 1995, and on September 15, 1995, vacated the Alexandria judgment. Its opinion concluded:

> Giving *Reich* its full effect, we reach the inevitable conclusion that the Harper taxpayers are entitled to full refunds. Accordingly, we will reverse the judgment of the trial court and enter final judgment in favor of the Harper taxpayers directing that the amounts unlawfully collected from them be refunded, with interest as provided in Code 58.1-1833.
>
> Reversed and final judgment
> 250 Va. 184, 197, 462 S.E. 2d 892, 899 (1995).

Petitioners and counsel in *Harper* then filed motions in the Supreme Court of Virginia asking that it remand the cases to the Alexandria court so that they might ask that court to consider and make allowances of reasonable fees in accordance with the common fund doctrine which has been part of the common law of Virginia since 1879, *Stovall v. Hardy*, 1 Va. December 342 (Special Ct. App. 1879), and had been affirmed as late as 1988 in *duPont v. Shackleford*, 235 Va. 588 (1988).

While waiting for the Supreme Court of Virginia to rule on their motions, petitioners and counsel in *Harper* asked the Alexandria court to enjoin the distribution of the common fund of $80,000,000 created by the Supreme Court of Virginia's decision in favor of the pensioners. The Alexandria court declined to act on the ground that it had no jurisdic-

tion because the case was still in the Supreme Court of Virginia and had not been remanded to it (App. 5, 6). Petitioners and counsel in *Harper* then asked for a review of the Alexandria court's ruling in accordance with Code of Virginia 8.01-626.

On November 2, 1995, the Supreme Court of Virginia denied the motions to remand the cases to the Alexandria court and declined review of the Alexandria court's ruling in the Code 8.01-626 proceeding. There had been no hearings by the Supreme Court of Virginia on the motions before it and there was no explanation of its rulings.

REASONS FOR GRANTING THE WRIT OF CERTIORARI

This cannot be called a standard Rule 10 case, but it deserves consideration by this Court. It is related to and comes out of the Virginia pension cases considered in the past and ruled on by this Court. It can be called a sequel to these earlier proceedings of the Virginia pension cases and raises Fourteenth Amendment issues.

It is perfectly clear that, like all Virginia officialdom, the Virginia court did not take a kindly view of the federal pensioners asking for refunds of the taxes levied on them in violation of federal law. And, like all Virginia officialdom, it did not take a kindly view of counsel for the pensioners. The staff of the Attorney General in particular looked on counsel for the pensioners as the enemy.

After the final judgment in favor of the 14,000 plus pensioners who had rejected the General Assembly's offer of settlement, counsel, as said, asked the Supreme Court of Virginia to remand the cases to the trial court so that they might ask for

allowance of reasonable fees. The Attorney General of Virginia and his staff opposed, arguing, with no grounds stated, that counsel for the pensioners were not entitled to compensation for having created a common fund for the benefit of the pensioners. The motions before the Supreme Court of Virginia were, as noted, denied out of hand, without hearing, on November 2, 1995.

The common fund doctrine is part of the law of Virignia as it is in many States. *Stovall,* supra; *duPont,* supra. It has been, of course, long recognized as a matter of federal law. See *Alyeska Pipeline Service Co. v. Wilderness Society,* 421 U.S. 240, 257-58 (1975); *Sprague v. Ticonic National Bank,* 307 U.S. 161, 165-67 (1939); *Boeing Co. v. Van Gemert,* 444 U.S. 472, 478 (1980). And the Virginia pension cases, like those coming from the other States, were always concerned only with issues of federal law and were disposed of by rulings here.

The Lewy suit, unlike the other Virginia pension cases, was, it should be said, originally filed in the Alexandria Division of the United States District for the Eastern District of Virginia, which declined to take jurisdiction on the representation by the State that it had a clear and speedy remedy in its refund statute. Code of Virginia 58.1-1824, *et seq.* The Lewy suit was accordingly refiled in the State court and consolidated with other pension cases, notably *Harper.* From first to last the issues were settled only after over seven years.

The refusal by the Supreme Court of Virignia to remand the *Lewy* and *Harper* cases to the trial court for consideration of allowance of reasonable fees to counsel for the pensioners blocked them

from any consideration for their services in creating a common fund in the amount of $80,000,000 as a result of the Supreme Court of Virginia's final ruling referred to already, and the approximately $310,000,000 of the General Assembly's offer of settlement. The claim for fees by counsel were causes of action which this Court has recognized as a proper interest protected by the Fourteenth Amendment (Section I).

As petitioners see it, the denial of their right to be heard on their claim violated the Fourteenth Amendment in possibly two ways. Their claim is a cause of action which this Court has recognized as an interest in property which cannot be taken without due process and a hearing on their claim would be required as a matter of due process. Further, as Petitioners see it, they are being denied the equal protection of the law also guaranteed by the Fourteenth Amendment. That language seems to petitioners to require the Virginia courts to administer the law, here the common fund doctrine, with an even hand, applying it to them as to others with claims under the doctrine recognized by both Virginia and federal law. It is impossible for the Virginia courts properly to deny the application of the doctrine on the ground that lawyers who create a common fund for the benefit of 170,000 federal pensioners whose legal rights have been violated under federal law are a special class to which the common fund doctrine does not apply.

Looked at in another way, the treatment of the petitioners might touch the First Amendment. They have been penalized by the Supreme Court of Virginia for having advocated the claims of the Virginia pensioners which that Court twice denied and

conceded only after this Court's decisions in *Harper, Lewy* and *Reich*. And, as noted, the pensioners' claims were anathema to Virginia officialdom generally. The petitioners did only what they considered right and an exercise of their right to speak out in a good cause. The Supreme Court of Virginia could scarcely have fined them for contempt in contending for the interest of the pensioners. The refusal to allow counsel for the pensioners to present their claim to compensation was no more defensible.

The result of the procedural, even the irregular procedural, ruling by the Supreme Court of Virginia has the effect of punishing counsel for their offense in having come to this Court for relief from judgments of the Virginia court. The obvious effect is to give notice to lawyers not to undertake litigation against the State of Virginia on behalf of claimants such as the federal pensioners seeking relief for violations of federal law. It will, for example, discourage any attempt to set aside the settlement of the pensioners who accepted it, because of the failure of the State to disclose what can be called the meaning and force of this Court's decision in *Reich*, a distinctly material fact.

As said at the outset, this is not the usual Rule 10 situation, but what the Virginia courts have done ought to be discouraged as a matter of basic, bedrock judicial and public policy. It involves a denial of petitioners' right to be heard on their cause of action, namely, a property right under this Court's decisions in *Tulsa Professional Collection Svcs. v. Pope*, 485 U.S. 478, 485 (1988), *Mullane v. Central Hanover Bank*, 339 U.S. 306, 311 (1950), *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 430 (1982),

and also a denial of the equal protection of the laws, namely, the right to have the common fund doctrine, recognized by Virginia, and in federal law, applied to them as to other parties with claims under that doctrine.

Finally, the First Amendment violation, as petitioners see it, is perhaps less obvious, but it is nevertheless one to consider. Lawyers ought not to be penalized by a court for doing their duty in a cause of which the court disapproves.

CONCLUSION

For the reasons stated above, the Petitioners ask that a writ of certiorari to the Supreme Court of Virginia be granted.

Respectfully submitted,

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Counsel for Petitioners

*Counsel of Record

P.S. Because of the difficulties of doing this Petition for Certiorari in the Alexandria Hospital, petitioner asks this Honorable Court to correct and amend any citations or references to the record in this case.

APPENDIX

Order of November 2, 1995, denying Motion with Respect to the Mandate and Motion to Amend the Mandate.

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Thursday the 2nd day of November, 1995.

Lawrence E. Lewy, et al., Appellants,

against Record No. 940411
Circuit Court No. CL891079

Virginia Department of Taxation, Appellee.

From the Circuit Court of the City of Alexandria

On consideration of the pleadings filed herein, the appellants' "Motion With Respect to the Mandate" and motion to amend the mandate are denied.

A Copy,

Teste:

/s/ David B. Beach
Clerk

Order of November 2, 1995, refusing petition regarding fees and injunction.

VIRGINIA:

Before Chief Justice Carrico and Justices Compton, Stephenson, Lacy, Hassell and Keenan of the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Thursday the 2nd day of November, 1995.

Lawrence E. Lewy, et al., Petitioners,

against

Virginia Department of Taxation, Respondent.

Upon a Petition for Review

On consideration of the motion of the petitioners, which is treated as a petition for review under Code § 8.01-626, the said petition is refused.

A Copy,

Teste:

/s/ David B. Beach
Clerk

Motion with Respect to Mandate (Denied, see App. #1).

IN THE SUPREME COURT OF VIRGINIA

Record No. 940411

LAWRENCE E. LEWY, et al

Appellants,

v.

VIRGINIA DEPARTMENT OF TAXATION,

Appellee

MOTION WITH RESPECT TO THE MANDATE IN THIS PROCEEDING

THE LEWY PLAINTIFFS move this Honorable Court in its mandate to remand the Lewy and Harper cases to the Circuit Court of the City of Alexandria to determine what is owing not only to the named plaintiffs in the cases heard on appeal, but also to the more than 14,000 pensioners who did not accept the compromise settlement offered by the Commonwealth and who accepted the second option offered by the Commonwealth in its solicitation of acceptances of the compromise offer, namely, to become in effect parties bound by the outcome of the Lew and Harper appeals from the judgment of the trial court in Alexandria.

Counsel for the Lewy Plaintiffs will ask the Alexandria court on remand for fees for their services in creating a common fund as a result of the litagation on behalf of the federal pensioners who were unlawfully taxed by the Commonwealth on their federal pensions.

/s/ J. B. Hyman
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/s/ Lawrence E. Lewy
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703/359-9088

Counsel for Appellants

[Certificate of Service omitted in printing]

Motion to Amend Mandate (Denied, see App. #1).

IN THE SUPREME COURT OF VIRGINIA

Record No. 940411

LAWRENCE E. LEWY, et al Appellants,

v.

VIRGINIA DEPARTMENT OF TAXATION,
Appellee

MOTION TO AMEND THE MANDATE IN THIS PROCEEDING

THIS COURT issued its mandate in this case dated September 15, 1995.

The Lewy Plaintiffs now move this honorable Court to amend that mandate and to remand the Lewy case to the Circuit Court of the City of Alexandria to determine what is owing not only to the named plaintiffs in the cases heard on appeal, but also to the more than 14,000 pensioners who did not accept the compromise settlement offered by the Commonwealth and who accepted the second option offered by the Commonwealth in its solicitation of acceptances of the compromise offer, namely, to become in effect parties bound by the outcome of the Lewy and Harper appeals from the judgment of the trial court in Alexandria.

Counsel for the Lewy Plaintiffs will ask the Alexandria court on remand for fees for their services in creating a common fund as a result of the litagation on behalf of the federal pensioners who were unlawfully taxed by the Commonwealth on their federal pensions.

/s/ J. B. Hyman
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Counsel for Appellants

[Certificate of Service omitted in printing]

Motion for Fees and Temporary Injunction
(Refused, See Appl. #2)

IN THE CIRCUIT COURT OF THE CITY OF ALEXANDRIA

Case No. CL 89-1079

LAWRENCE E. LEWY, et al

Plaintiffs,

v.

VIRGINIA DEPARTMENT OF TAXATION,

Defendant

MOTION FOR AWARD OF ATTORNEYS' FEES AND FOR TEMPORARY INJUNCTION

COME NOW Lawrence E. Lewy and Joseph B. Hyman, counsel in *Lewy v. Virginia Department of Taxation* and say as follows:

1. *Lewy v. Virginia Department of Taxation* was the first of the suits filed asking for refund of the taxes levied illegally by the Commonwealth on the income from federal pensions.

2. For over six and a half years counsel have pressed the claims of the federal pensioners to refund pursuant to Code of Virginia 58.1-1824, *et seq.* The litigation has involved two hearings before this Court, appeals to the Supreme Court of Virginia, and two successful petitions for certiorari in the Supreme Court of the United States. The Supreme Court of the United States has twice vacated the judgment of the Supreme Court of Virginia and established that the taxation at issue was in violation of federal law, namely, 4 U.S.C. 111 and the constitutional doctrine of inter-governmental tax immunity. The litigation also resulted in the decision of the Supreme Court of Virginia, dated September 15, 1995, holding that the federal pensioners are entitled to full refunds of the taxes illegally levied. The decision by the Supreme Court of the United States in *Harper v. Virgin-*

ia Department of Taxation, 113 S. Ct. 2510 (1993) and in *Lewy v. Virginia Department of Taxation*, 113 S. Ct. 3024 (1993) established the illegality of the taxes at issue.

3. Under the spur of the decisions by the Supreme Court referred to above, the General Assembly of Virginia authorized the payment to the federal pensioners in Virginia of approximately 45% of their claims including the interest due thereon. The total amount of the proposed settlement was $340,000,000 and it provided that the pensioners who declined to accept the offer were to be treated at their option as bound by the outcome of the *Lewy* and *Harper* cases then pending on appeal to the Supreme Court of Virginia.

4. Mays & Valentine, as counsel to Kator Scott & Heller have filed in this Court motions with respect to Kator Scott & Heller's claim for attorneys' fees based on the common fund doctrine which is recognized in Virginia, and also federal law, and is part of the State's common law. Lewy and Hyman endorse and join in the application for attorneys' fees and a temporary injunction enjoining the total distribution of the approximately $80,000,000 of refunds due the federal pensioners who did not accept the settlement offered by the Commonwealth, but chose instead to be bound by the decision of the Supreme Court of Virginia in the *Lewy* and *Harper* cases then on appeal to the Supreme Court of Virginia.

WHEREFORE counsel move this honorable court to enjoin the complete distribution of the common fund created as a result of the decision of the Supreme Court of Virginia dated September 15, 1995, and to order the Department of Taxation to pay into the registry of this Court 10% of the common fund created in the amount of approximately $80,000,000. They also ask that this Court recognize their claim to attorneys' fees for the creation of the settlement fund of about $300,000,000 which resulted from the successful litigation before the Su-

preme Court of the United States and its recognition of the illegality of the taxes levied by the Commonwealth on the federal pensions received by the federal pensioners in the Commonwealth.

/s/ J. B. Hyman
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/s/ Lawrence E. Lewy
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Counsel for Appellants

[Certificate of Service omitted in printing]

Order of Circuit Court of the City of Alexandria, October 25, 1995, denying injunction, etc. (Motion joined in by Lewy)

VIRGINIA:

IN THE CIRCUIT COURT FOR THE CITY OF ALEXANDRIA

Case No. CL891080

HENRY HARPER, et al.,

Plaintiffs,

v.

VIRGINIA DEPARTMENT OF TAXATION,

ORDER

Came this day Kator, Scott & Heller, P.C. (hereinafter "Kator"), by counsel, upon its motion for temporary injunction requesting that this Court (1) enjoin the Department of Taxation from distributing 10% of the tax refunds to be paid to each of the 14,250 federal retirees who agreed to join the *Harper* suit, such amount to be withheld solely from the interest component of the tax refunds and not from the principal component of the refunds, and (2) direct the Department of Taxation to deposit the amount so withheld form the tax refunds into the registry of this Court until a determination has been made of the Application for Award of Attorneys' fees. After considering the reasons set forth in the motion, memoranda of the parties, and the argument of counsel, it is hereby

ORDERED that Kator's motion for temporary injunction be, and hereby is, denied.

ENTER: 10/25/95
/s/ Donald H. Kent
Donald H. Kent, Judge

We Ask For This:

/s/ Gregory E. Lucyk
The Honorable James S. Gilmore, III
Catherine C. Hammond, Esq.
Gregory E. Lucyk, Esq.,
Office of the Attorney General
900 East Main Street
Richmond, Virginia 23219

Counsel for the Virginia Department of Taxation

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Carter Glass, IV
John S. West
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Counsel for Kator, Scott & Heller, P.C.

A COPY TESTE:
Edward Semonian, Clerk

By /s/ E. L. Carpenter, Deputy Clerk

Order of September 15, 1995 granting final judgment for Appellants on the original case.

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Friday the 15th day of September, 1995.

Lawrence E. Lewy, et al., Appellants,

against Record No. 940411
Circuit Court No. CL891079

Virginia Department of Taxation, Appellee.

Upon an appeal from a judgment rendered by the Circuit Court of the City of Alexandria on the 19th day of January, 1994.

For reasons stated in writing and filed with the record, the Court is of opinion that there is error in the judgment appealed from. Accordingly, the judgment is reversed and annulled, and final judgment is entered in favor of the appellants with direction that the amounts unlawfully collected from them be refunded, with interest as provided in Code § 58.1-1833.

This order shall be certified to the said circuit court.

A Copy,

Teste:

/s/ David B. Beach
Clerk

Supreme Court, U.S.
FILED
FEB 29 1996
CLERK

(2)

No. 95-1221

In The

Supreme Court of the United States

October Term, 1995

JOSEPH B. HYMAN,

Petitioner,

v.

VIRGINIA DEPARTMENT OF TAXATION,

Respondent.

Petition For A Writ Of Certiorari To The Supreme Court Of Virginia

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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OR CALL COLLECT (402) 342-2831

13 pp

QUESTION PRESENTED

Whether the Supreme Court of Virginia properly refused to consider petitioner's post judgment claim for an attorney's fee under a state law common fund theory where (1) the state common fund rule is discretionary with the court and does not impress a lien upon or create an entitlement to a fee, and (2) where the undisputed facts establish that the fund was not under control of the court.

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STATEMENT OF THE CASE

The petitioner in this case, Joseph B. Hyman, Esquire, was not a party in any proceeding before the Virginia Supreme Court below. He was counsel to a group of 25 federal retirees seeking tax refunds in *Lewy v. Virginia Department of Taxation* – a companion suit to a case eventually decided in this Court. *See Harper v. Virginia Department of Taxation*, 509 U.S. ___, 113 S.Ct. 2520 (1993), *on remand, Harper v. Virginia Department of Taxation*, 250 Va. 184 (1995) (final judgment entered in favor of 130 retiree litigants) (hereafter *"Harper"*).

Upon the commencement of the *Harper* and *Lewy* suits, the Virginia General Assembly adopted legislation which had the effect of extending the statute of limitations and thus preserving the claims of *all* affected federal retirees seeking similar tax refunds (some 165,000 in number). *See* Va. Code § 58.1-1823(B) (1989). Later, the legislature enacted a statutory refund program which allowed these non-litigating retirees a choice: (1) to compromise their refund claims by accepting 75% of their tax refund amount, excluding interest, or (2) enter into an agreement with the Department of Taxation to "opt-out" of the settlement and be bound by the outcome of the *Harper* suit. Approximately 140,000 retirees took the settlement, and the remaining 14,250 chose to opt-out and be bound by the result in *Harper*. On September 15, 1995, the *Harper* case was decided in favor of the 130 retiree litigants in that case, and a like judgment was entered in the *Lewy* case. Pursuant to their agreements with the Department, the 14,000 plus opt-outs also became entitled to

payment of the full amount of their refunds, with interest. The total amount payable to these retirees exceeded $78 million.

Petitioner Hyman filed an injunction request with the Virginia Supreme Court on October 27, 1995, asking the Court to order the Department to deduct a 10% attorney's fee from the checks of the 14,000 plus opt-outs, thereby creating an attorney's fee of $7.8 million for distribution to counsel for the litigating retirees. The Virginia Department of Taxation, by counsel, filed pleadings in opposition to the request. The Supreme Court entered its order denying the requested injunction on November 2, 1995. On November 9, 1995, the Department mailed checks to all 155 litigating retirees, and to all 14,000 plus nonlitigating retirees. The Commonwealth's refund obligation under the Court's judgment has been discharged and there are no funds earmarked for litigants or opt-outs from which petitioner could draw a fee. In any event, he is not entitled to such fee as a matter of state law, and there is no viable federal issue which warrants review by this Court.

REASONS FOR DENYING THE WRIT

1. The State Law Common Fund Doctrine Does Not Create An Entitlement To A Fee.

The common fund doctrine in Virginia, as recognized by the Virginia Supreme Court, does not create an entitlement to a fee. It does not impress a lien upon any funds or create a cause of action for the recovery of a fee. It merely defines "the power of a court to require one party

to contribute to the fees of the counsel of another party." *McCormick v. Elsea*, 107 Va. 472, 475 (1907). It is "a power capable of great abuse and one which should be exercised with the most jealous caution and regard to the right of the litigants." *Stoneburner v. Motley*, 95 Va. 784, 790 (1898). On appeal of any such fee determination, the standard of review is whether "the trial court abused its discretion in allowing the fee or the amount thereof." *Realty Corp. v. Looney*, 201 Va. 432, 435, 11 S.E.2d 410 (1959).

Virginia law has confined the common fund doctrine narrowly, to cases involving decedents estates, *duPont v. Shackleford*, 235 Va. 588, 369 S.E.2d 673 (1988); judicial sales of real estate, *Austin v. Dobbins*, 219 Va. 930, 252 S.E.2d 588 (1979); *Realty Corp. v. Looney, supra*; stockholders suits, *Starring v. Kemp*, 167 Va. 429, 124 S.E. 174 (1936); and like cases. Common fund fees have *never* been granted in a Virginia tax refund case, however, and it would be adverse to sound public policy to encourage such a result. *See e.g.*, § 58.1-1829 (prohibiting any assessment of costs against the Commonwealth in a tax refund action).

Further, the common fund doctrine is applicable only to funds within the control of the court. In *Oklahoma Tax Comm'n v. Ricks*, 885 P.2d 1336 (Okla. 1994), a case nearly identical to Hyman's claim here, the Supreme Court of Oklahoma denied a common fund claim filed by the attorney who recovered a favorable judgment for federal retirees in that state. As the Court stated, "[t]he majority rule in state and federal courts is that, before a money pool may be subjected to a common-fund attorney's fee assessment, the created or preserved fund must be brought under the direct supervision and control of the

court." *Id.* at 1339-40. Here, because Treasury funds were used to provide refunds to Virginia's federal retirees, they were not under the control of any court. The Oklahoma court emphasized this same point in *Ricks* in holding the common fund doctrine inapplicable:

> Because a state treasury is in no sense under the custody or control of the [trial] court, any action by the court which would precipitate a flow of monies from the state treasury cannot be deemed one to "create, preserve or protect" a fund. Where a final order merely increases the taxing authority's liability, no segregable fund results from which attorney's fees may be awarded.

Ricks, 885 P.2d at 1340-41. This holding is persuasive here.

There is no indication in Virginia case law which suggests that the Commonwealth has joined the minority of states which have "dispense[d] with or relax[ed] the otherwise rigid requirement of present court control." *Id.* at 1341. *See Patterson v. Trust Co.*, 156 Va. 763, 774, 158 S.E. 168 (1931) (Court may award fees out of fund "which is within the custody or control of the Court"). *Stovall v. Hardy*, 1 Va. Dec. 342 (1879), involved proceeds from a judicial sale of real property. *duPont v. Shackelford*, 235 Va. 588, 369 S.E.2d 673 (1988), in which the Supreme Court recognized the continued existence of the common fund doctrine (although not applying it to a case where all parties were represented by counsel), involved an estate.[1]

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[1] *See also Austin v. Dobbins*, 219 Va. 930, 252 S.E.2d 588 (1979) (partition suit; fee ordered from proceeds of judicial sale of real estate); *Realty Corp. v. Looney*, 201 Va. 432, 11 S.E.2d 410

Clearly, these cases all involved tangible and segregable value over which the court exercised some form of direct control. The instant case simply does not meet this requirement as a matter of Virginia law.

Finally, it must be emphasized that it was not solely counsels' efforts which created a right of recovery for the non-litigating retirees. The operative action which paved the way for recovery by the retirees was taken by the Virginia General Assembly in a Special Session in April 1989, called immediately after this Court's decision in *Davis v. Michigan Dep't. of Treasury*, 489 U.S. 803 (1989). In that Special Session, the General Assembly adopted an amendment *extending the statute of limitations* for the filing of retiree claims. *See* § 58.1-1823(B) (1989). This amendment was adopted *long* before any of the refund suits reached judgment, and it alone preserved a right of recovery for literally tens of thousands of retirees who otherwise would have been time barred. In sum, Hyman's common fund claim was properly refused by the Virginia courts as a matter of Virginia state law, and there is no reason for this Court to review that state law question.

(1959) (partition sale of real estate; fee paid from proceeds of judicial sale); *White v. Thompson*, 186 Va. 567, 42 S.E.2d 868 (1947) (creditors' suit; fee paid from proceeds of judicial sale of lands); *Starring v. Kemp*, 167 Va. 429, 124 S.E. 174 (1936) (stockholders' suit; fee ordered from dividends paid by company); *Dunlop v. McGehee*, 139 Va. 643, 124 S.E. 199 (1924) (dissolution of partnership; fee ordered from assets); *McCormick v. Elsea*, 107 Va. 472 (1907) (decedent's estate; fee ordered from assets of estate); *Stoneburner v. Motley*, 95 Va. 784 (1898) (creditors' suit; fee ordered as part of fund distribution by court).

2. Petitioner Has No Constitutional Right To A Common Fund Attorney's Fee.

In order to state a claim for deprivation of property without due process, a party must first establish that he was deprived of a *cognizable property interest*. As this Court has noted on many occasions, the Constitution does not create property interests. Rather, they are created and defined by existing rules and understandings under state law which support an *enforceable claim of entitlement*. *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972); *Leis v. Flynt*, 439 U.S. 438, 441-42 (1979).

In *Leis v. Flynt, supra*, this Court made clear that a *unilateral* expectation on the part of a would-be property holder cannot create an entitlement. In *Leis*, an out-of-state attorney sought admission *pro hac vice* in an Ohio trial court to represent a criminal defendant. The trial court exercised its discretion to deny the request, and the attorney sued, claiming he had a property interest in practicing his profession in the Ohio courts. The Court disagreed. "A claim of entitlement under state law, to be enforceable, must be derived from a statute or legal rule or a mutually explicit understanding." *Id.* at 442. Where the claim is premised on the *discretion* of the granting authority, there is no "entitlement" and, thus, no cognizable property interest protected by the Constitution. That is the case here.

There is no statute or rule of law which *entitles* petitioner to any fees under the common fund doctrine. He has alleged no lien for fees; no representation agreement; no promise from the retirees; nothing which gives him an enforceable claim of *entitlement*. As noted above, the

ordering of fees under the common fund doctrine in Virginia is within the broad discretion of the Court. Thus, the law provides nothing more than a unilateral expectation that an attorney may receive a fee. This does not create a cognizable property interest under the Federal Constitution.

Having failed to show a property interest in the common fund fee itself, petitioner's fallback position is that he has a property interest in his "cause of action" for attorneys fees. This is simply wrong. "The essential elements of a good cause of action, whether based on an alleged breach of contract or on a tortious act, are a legal obligation of a defendant to the plaintiff, a violation or breach of that right or duty, and a consequential injury or damage to the plaintiff." *Caudill v. Wise Rambler*, 210 Va. 11, 13, 168 S.E. 2d 257, 259 (1969). Here, Hyman cannot establish that the state has a "legal obligation" under any theory to award him a fee from the refund monies paid from the general Treasury. As such, he has no cause of action as a matter of law.

The cases cited by petitioner to support his cause of action property interest theory are completely distinguishable, as all of them involved a legal right or obligation presently enforceable under state law. *See Tulsa Professional Collection Services v. Pope*, 485 U.S. 478 (1988) (hospital's claim against estate for medical bills incurred in treating decedent's final illness); *United States v. Security Indus. Bank*, 459 U.S. 70 (1972) (money lenders obtained perfected liens on debtors' household furnishings and appliances); *Mullane v. Central Hanover Bank*, 339 U.S. 306 (1950) (right of beneficiaries of trust to proceed against trustee for negligence or breach of trust). Petitioner's

unilateral expectancy of an attorneys' fee is nothing like the state law property interests protected in these cases. He has no legally enforceable right to a fee, and thus cannot state such a claim under the Federal Constitution.

Finally, petitioner contends that he has a First Amendment right to "speak out" against state policy, and the refusal to grant him a common fund attorney's fee violates his right to do so. This argument is so lacking in merit, and so unsupported by logic or precedent, that no formal response is necessary.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari to the Supreme Court of Virginia should be denied.

Respectfully submitted,

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Supreme Court, U.S.
FILED
MAR 25 1996
CLERK

(3)

No. 95-1221

In The

Supreme Court of the United States

October Term, 1995

JOSEPH B. HYMAN,

Petitioner,

v.

VIRGINIA DEPARTMENT OF TAXATION,

Respondent.

Petition For A Writ Of Certiorari To The Supreme Court Of Virginia

PETITIONER'S REPLY BRIEF

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QUESTIONS PRESENTED

1. Whether the nature of the common fund rule is discretionary to the extent that it is permissible for it to be ignored.

2. Whether the fund was under the control of the Court.

3. Whether Petitioner asserts a constitutional right.

ADDITIONAL STATEMENT OF THE CASE

As to the relative importance of the *Lewy* and *Harper* cases, it should be noted that neither the order of filing nor the number of parties represented has any bearing on the intellectual content and value to the retirees of the efforts of the late Joseph B. Hyman, deceased, on whose behalf this reply is filed.

In point of fact, Mr. Lewy filed in the United States District Court at Alexandria prior to either of the cases, but the Alexandria court dismissed upon Virginia's representation there was a prompt and efficient remedy in the Virginia courts. Lewy then re-filed in the State court on a date after Harper, and *Harper* became the lead case through the long and tortuous history of this litigation.

The Virginia officials were being overwhelmed with refund claims because of the huge number of retirees affected. This was the origin of the legislature's extending the statute of limitations until the conclusion of the various refund cases.

Petitioner Hyman and counsel in *Harper* were denied fees out-of-hand with no opinion when they presented such requests three different ways, as noted in the original Petition.

The action of the State court was simply a one-line refusal, and in the other two instances, one-line denials of the requested relief with no hearing, no argument and no explanation or opinion.

Hence the opposition seems to be presenting what it believes the court's rationale would have been if there had been a hearing; or, alternatively, a rationale which justifies the lack of granting a hearing by claiming no relief could or should have been granted.

REASONS FOR GRANTING CERTIORARI

1. The Common Fund Rule Is Applicable In The Instant Case.

As recently as 1988, the Virginia Court reaffirmed this common law principle in *du Pont v. Shackleford*, 235 Va. 588, 594, 369 S.E.2d 673 (1988). In that case, the Court succinctly outlined the basis for the "common fund" doctrine as follows:

> The essence of the common fund doctrine is that it would be unfair to permit one party to retain counsel, to file suit, to secure a benefit that all will share, yet to leave the full cost of the effort upon one party who initiated the suit while others who will share the proceeds make no contribution. If others are to sit idly by and reap the benefits of one litigant's labors, the idle parties should share in the cost of those labors. In short, the common fund doctrine is aimed at preventing "free rides."

Id. at 594-95.

The *Lewy* and *Harper* cases epitomize the attainment of a common benefit for a large number of nonlitigants; indeed, in light of the legislative action which permitted the 14,250 nonlitigating retirees effectively to join the *Lewy* and *Harper* suits by opting out of the Settlement Fund, this case is the paradigm example of the proper circumstances for application of the "common fund" doctrine.

The common fund doctrine has been frequently applied in the context of taxpayer suits similar to *Lewy* and *Harper* and fees have been awarded under the common fund doctrine in suits based on the *Davis* decision itself. For example, fees have been granted in *Davis* suits

in Alabama, Arkansas, Iowa, Louisiana, Kansas, Michigan, Mississippi, New Mexico, South Carolina and Utah. See *Rinehart v. Sizemore*, No. 89-704-M (Cir. Ct. of Montgomery Cty. Ala. January 29, 1993); *Pledger v. Bosnick*, 306 Ark. 45, 811 S.W.2d 286 (1991); *Hagge v. Iowa State Dep't. of Revenue and Finance*, No. LA 20859 (Linn Cty. Dist. Ct. April 7, 1994); *Barker v. State of Kansas*, No. 89-CV-666 (Shawnee Cty. Dist. Ct. August 25, 1994) (awards in Utah and Mississippi cited at 15); *Ponthier v. Tarver*, No. 3396 (Bd. of Tax Appeals, State of La. May 4 ,1992); *Bryde v. Michigan*, No. 89-12513-CM (Ct. Claims February 8, 1991); *Burns v. State of New Mexico*, No. SF 89-1314 (Santa Fe Cty. Dist. Ct. July 26, 1990); *Bass v. State of South Carolina*, No. 89-CP-26-1136 (Horry Cty. Ct. of Common Pleas March 11, 1994). In addition to those who opted out, there were 140,000 retirees who took the settlement and are being paid without interest over several years. It is difficult to believe that these people would ever have had a settlement offered at all if it had not been for the efforts of counsel in the *Lewy* and *Harper* cases.

The opposition claims that it was not "solely" counsel's efforts which brought about recovery, but one needs only to look at the history of this litigation to realize that Virginia did nothing that it was not compelled to do by this Court. As previously mentioned, the General Assembly's extension was to prevent a hopeless administrative burden that could not possibly have been handled.

2. The Fund Was Indeed Under The Control Of The Court

It is not necessary that the funds be paid into court or created by the court's action for the court to have control of the funds.

Court control in common fund cases is often "remote and indirect." J.P. Dawson, *Lawyers and Involuntary Clients: Attorneys' Fees From Funds*, 87 Harv. L.R. 1597, 1614 (1974) (cited with approval in *duPont v. Shackleford*, 235 Va. at 595). There is no requirement that "the suit must actually bring money into the court as a prerequisite to the court's power to order reimbursement of expenses." *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375, 392 (1970).

The key to court control of the common fund is not direct control over a fund but jurisdiction over the parties which possess or control a fund. As a result, the Virginia cases applying the common fund doctrine premise the assertion of control of the common fund on the court's jurisdiction over the parties and the claims, not on the court's direct custody of the fund at issue. In *duPont*, for example, the fund was in the control of the court because the court had jurisdiction over the parties and the claims. *duPont*, 235 Va. at 593. Even in common fund cases involving real property, direct control is asserted over the *parties* that own an interest in the property. Control over the property itself is asserted only *indirectly* through those parties. *Austin v. Dobbins*, 219 Va. 930, 252 S.E.2d 588 (1979). Similarly, in stockholder suits, the Court controlled the fund through its authority to order the defendant, which possessed the common fund, to pay a portion of the fund to plaintiff's counsel. *Starring v. Kemp*, 167 Va. 429, 437-38, 124 S.E. 174 (1936). The Court never asserted direct control over the fund.

3. Petitioner Urges A Constitutionally Protectable Claim

This Court has stated, it is "affirmatively settled . . . that a cause of action is a species of property

protected by the Fourteenth Amendment's Due Process Clause." *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 at 428 (1982). In *Logan* the Court held that a party had a protected property interest in a claim of unlawful termination pursuant to the Illinois Fair Employment Practices Act. *Id.* The Court has also upheld a party's property interest in an unsecured claim against an estate for an unpaid bill, *Tulsa Professional Collection Svs. v. Pope*, 485 U.S. 478, 485 (1988), as well as in a claim against a trust fund fiduciary. *Mullane v. Central Hanover Bank*, 339 U.S. 306, 311 (1950). Petitioner's equitable cause of action based upon the common fund doctrine likewise gives rise to a protected property interest in the Settlement Fund.

CONCLUSION

For the foregoing reasons in addition to those in the original Petition, certiorari should be granted.

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